United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1407

Te be argued by
JAMES A. MOSS

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1407

UNITED STATES OF AMERICA,
Appellee,

—v.—

MICHAEL GOGARTY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America

JAMES A. MOSS,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

Michael Gogarty appeals from a judgment of conviction entered on November 24, 1975 in the United States District Court for the Southern District of New York after a one day trial before the Honorable Kevin T. Duffy, sitting without a jury.

Indictment 75 Cr. 981, filed October 10, 1975, charged Gogarty in Counts One and Three with having threatened the life of the President of the United States, in violation of Title 18, United States Code, Section 871. In Count Two Gogarty was charged with having assaulted and interfered with a federal officer, in violation of Title 18, United States Code, Section 111.

On October 23, 1975, Judge Duffy found Gogarty guilty on Count Two of the Indictment and not guilty on Counts One and Three.

On November 24, 1975, Gogarty was sentenced to a term of two years imprisonment.

Statement of Facts

The Government's Case

The proof at trial focused upon two occasions when agents of the federal government received threats against the life of the President from Gogarty—once on March 11, 1973 and again on July 14, 1975. On the first occasion Gogarty assaulted one of the arresting officers.

A. The March 11, 1973 Arrest.

On the evening of March 11, 1973, Gerald Holland, a special agent of the Federal Bureau of Investigation, received a telephone call from an individual who identified himself as Michael Gogarty. Gogarty told Agent Holland that he would shoot President Nixon if Gogarty's brother were not released from the Tombs. (Tr. 6-7).*

In response to this threat, Thomas Doyle and William Kehoe, special agents of the United States Secret Service, and Detective Henry Beattie, of the New York City Police Department, located Gogarty at his address in the Bronx, New York. (Tr. 11-12, 26-27). At that time Gogarty stated that he had a weapon and was going to kill the President. (Tr. 18, 28). Agent Kehoe then placed Gogarty under arrest and advised him of his constitutional rights. (Tr. 18-19, 28).

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* References to the trial transcript are abbreviated herein as "Tr."; to Gogarty's brief as "Br."; and to Gogarty's Appendix as "App."

As Gogarty was being escorted by the agents to the Regional Office of the Secret Service at 90 Church Street in Manhattan, he repeated his earlier threats. (Tr. 30). Upon his arrival at the Regional Office, Gogarty kicked Agent Doyle in the hand, dislocating one of his fingers. (Tr. 21-22). Later that night, Gogarty kicked a doctor at Bellevue Hospital in the groin and told the agents that, if he ever saw Agent Doyle or Agent Kehoe on the street, or any members of their families, he would shoot them. (Tr. 22-23, 32).

B. The July 14, 1975 Arrest.

Approximately 27 months later, on the afternoon of July 14, 1975, George Hofmann, a special agent of the United States Secret Service, received a telephone call from an individual who identified himself as Michael Gogarty. Gogarty told Agent Hofmann that he was "going to kill the President of the United States" and "blow the President's brains out." (Tr. 40-41). After this call, Agent Hofmann and two other special agents proceeded to Gogarty's apartment in the Bronx. The agents were admitted to the apartment by Gogarty's father. (Tr. 41-42).

At first, Gogarty denied to Agent Hofmann that he had made the telephone call (Tr. 43); subsequently, however, he admitted making the call. (Tr. 44). Agent Hofmann placed Gogarty under arrest. (Tr. 44).

The Defense Case

Gogarty called one witness, his father, James Gogarty, who testified that on July 14, 1975, his son had been drinking beer and taking pills. (Tr. 60). On cross-examination, however, Mr. Gogarty admitted that his son's conversations had been coherent and responsive throughout that day. (Tr. 64-67).

The Court's Witness

At the conclusion of the defense case, Judge Duffy granted Gogarty a recess so that his attorney, Patrick Broderick, Esq., could discuss with the Government "whether [at the time of Gogarty's second arrest in July 1975, he] . . . was going to a psychiatrist pursuant to some request or direction by the Government." (Tr. 68). Immediately after the recess, Mr. Broderick proposed a stipulation that the Secret Service and the United States Attorney's office had been aware that Gogarty was being treated by two psychiatrists and, at the time of the July 1975 arrest, was under treatment for alcoholism and was being given drugs pursuant to that treatment. (Tr. 68-69).

The Assistant United States Attorney agreed to stipulate only that after the March 1973 arrest, "perhaps in May", the Government was aware that Gogarty was *supposed to be* receiving out-patient care. (Tr. 69).

In order to reconcile the differences between the positions of the Government and the defense, Judge Duffy recalled and examined Special Agent William Kehoe, the case agent on the Gogarty matter during 1973. (Tr. 69-70). Agent Kehoe testified that he was aware Gogarty had been receiving psychiatric treatment in 1973 because "there was a stipulation that he had to to defer his prosecution . . ." (Tr. 71-72).

Mr. Broderick declined to ask Agent Kehoe any questions concerning this testimony. (Tr. 72).

ARGUMENT

Gogarty's entry into a deferred prosecution program after his March 1973 arrest did not bar this prosecution. Any right to raise this issue was waived by Gogarty's failure to assert it below.

Gogarty contends that the inclusion of the March 1973 assault charge in the indictment below was improper and requires reversal of his conviction on that charge. Gogarty bases this contention upon the fact that a complaint charging him with the same assault had been the subject of a December 1973 deferred prosecution agreement and that the complaint was dismissed at the Government's request by a federal magistrate on July 3, 1975. This claim, raised for the first time in this Court, was waived by Gogarty's failure to assert it below at any time prior to his conviction. Indeed, this appeal presents a classic example why claims of this sort should not be permitted to be raised for the first time on appeal. For not only has Gogarty, in an attempt to raise a colorable claim, made factual assertions which are entirely unsupported by the record below, but he has also, by belatedly raising this claim, deprived the Government of an opportunity to place in the record the facts that conclusively rebut his utterly baseless contention.

There are certain undisputed facts concerning the proceedings which preceded Gogarty's trial. These facts, all readily accessible in the records of the Magistrate's and the District Court, are as follows:

On March 11, 1973, Gogarty was arrested in the Bronx, New York by special agents of the United States Secret Service. On the following day, he was brought before a United States Magistrate upon a complaint sworn to by Special Agent William Kehoe charging Gogarty with threatening the life of the President. During

this proceeding, the Magistrate appointed the Legal Aid Society to represent Gogarty. On March 19, 1973, the Honorable Lawrence W. Pierce ordered that Gogarty undergo a psychiatric competency examination; Gogarty was found competent to stand trial on March 24, 1973, by Dr. Arthur N. Foxe.

On April 23, 1973, Gogarty, Gogarty's lawyer, Larry S. Greenberg of the Legal Aid Society, Assistant United States Attorney Bart M. Schwartz and Magistrate Gerard Goettel executed a form "deferred prosecution" agreement. (App., Exhibit "E"). This agreement provided that the prosecution pending against Gogarty would be deferred for a period of twelve months during which time Gogarty was to satisfactorily participate in an approved psychiatric treatment program and comply with several conditions of good behavior. These conditions required, *inter alia*, that Gogarty refrain from violation of any federal or state penal law.

Under the terms of this agreement, Gogarty waived his right to a speedy trial and consented to permit disclosure to the United States Attorney of the records of treatment necessary for the Government to determine his compliance with the conditions governing the deferral of his prosecution.

On its part the Government agreed not to institute prosecution against Gogarty for the pending charge "[i]f, upon completion of [the] period of supervision, a written report from the psychiatric clinic is received to the effect that [Gogarty has] fully complied with all of the above conditions and [has] remained a satisfactory participant in the approved program". The agreement empowered the United States Attorney to "revoke and modify any condition of this provisional release or change the period of supervision." In addition, the United States Attorney was permitted to reinstitute prosecution within the twelve-month period of supervision "[s]hould [Gogarty] violate

any of the foregoing conditions or cease to be a satisfactory participant in the approved program." *

On November 10, 1973, Gogarty was brought before the Honorable Inzer B. Wyatt upon the complaint of Special Agent Thomas W. Doyle that Gogarty had assaulted Agent Doyle during his arrest on March 11, 1973.** (App., Exhibit "F"). The Legal Aid Society was appointed to represent Gogarty on this charge. On November 16, 1973, the Honorable Lee P. Gagliardi ordered that Gogarty again undergo a competency examination; Gogarty was again found competent to stand trial on November 19, 1973, by Drs. Marcia Scott and Anthony Jimenez.

On December 20, 1973, a second deferred prosecution agreement was executed by Gogarty, his attorney,

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* Gogarty claims that the Government was bound by this provision to reinitiate prosecution, if at all, within the twelve-month period of supervision. (Br. at 10-11). This assertion misinterprets the provision, which may be characterized as a form of "acceleration" clause, allowing the Government the option to reinstitute prosecution should Gogarty flagrantly violate the terms of the agreement, without having to wait until the conclusion of the period of supervision for the written report of the approved treatment clinic. The provision was not, as Gogarty asserts, intended to vitiate the fundamental and express purpose of the agreement: which was, of course, to allow the Government the opportunity to suspend prosecutive judgment on Gogarty until the conclusion of the period of supervision, so that Gogarty's entire performance under the supervised treatment program could be evaluated.

The argument that prosecution, if reinitiated, had to be within the twelve-month period of deferral is, of course, undercut by the provision of the agreement which states that a condition of final dismissal is the receipt *after* the twelve-month period of a written report that Gogarty had satisfactorily participated in the approved treatment program and complied with the conditions of good behavior. The Government could hardly be expected to act on a negative report *within* the twelve-month period if the report was not to be received until *after* the period had run.

** It is Gogarty's conviction for this offense on October 23, 1975 that is the subject of this appeal.

Michelle Hermann of the Legal Aid Society, Assistant United States Attorney David A. Cutner and Magistrate Sol Schreiber. (App., Exhibit "G"). This agreement included within its coverage both of the charges pending against Gogarty, *i.e.*, the threat and assault charges. By its provisions, this agreement deferred prosecution of these charges for a twelve-month period during which time Gogarty was to comply with specified conditions of good behavior and satisfactorily participate in an alcoholic treatment program. The conditions of good behavior again provided, *inter alia*, that Gogarty should refrain from engaging in criminal conduct. On January 8, 1974, Gogarty and the Government agreed to modify the agreement to require that Gogarty also make biweekly visits and weekly telephone calls to the United States Attorney's Office. (App., Exhibit "J").

This second deferred prosecution agreement again imposed upon the Government the obligation not to reinstitute prosecution against Gogarty on the pending charges if, upon completion of the period of supervision, "a written report from the clinic is received to the effect that [Gogarty has] fully complied with all of the above conditions and [has] remained a satisfactory participant in the approved program." *

On July 3, 1975, upon the request of the Government, a United States Magistrate dismissed the two complaints pending against Gogarty. (App., Exhibit "J"). There is no indication in the record whatsoever that Gogarty complied with the deferred prosecution agreements in any of their particulars or that, accordingly, the Government's dismissals were entered pursuant to the deferral agreement with prejudice to any further prosecution.

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* Like its predecessor, this agreement permitted the United States Attorney to revoke or modify the conditions of good behavior and change the period of supervision. The United States Attorney was again permitted to initiate prosecution prior to the expiration of the twelve month period upon Gogarty's failure to comply with his obligations under the agreement.

Less than two weeks later, on July 14, 1975, Gogarty was again arrested upon a new charge that he had threatened to kill the President of the United States, in violation of Title 18, United States Code, Section 871. Patrick Broderick, Esq., was appointed to represent Gogarty on July 29, 1975. In September 1975, Judge Duffy ordered that Gogarty undergo a competency examination; Gogarty was found competent to stand trial on September 19, 1975, by Dr. Lawrence D. Sporty.

On October 10, 1975, the instant indictment, 75 Cr. 981, was filed charging Gogarty with this latest offense and with the two prior offenses for which the complaints had been dismissed.

By failing to claim below that the deferred prosecution agreement prevented the Government from prosecuting him, Gogarty surely waived any claim that the above-recited facts—all of which are contained in the records of the Magistrate's and District Court—barred his conviction for assault.

Rule 12(b)(2) of the Federal Rules of Criminal Procedure provided, prior to amendment,* in pertinent part that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that failure to present such defenses or objections "constitutes a waiver thereof, but the Court for cause shown may grant relief from the waiver." By its terms, Rule 12(b)(2) applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction of the trial court.** *Davis* v. *United States*,

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* Rule 12(b)(2) was amended, effective December 1, 1975, after the date of the trial below. The relevant changes in this rule were not substantive.

** The claim herein does not challenge the jurisdiction of the trial court over the subject matter of the assault charge; rather, Gogarty assails the jurisdiction of the trial court over his person.

[Footnote continued on following page]

411 U.S. 233, 236-37 (1973); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Thus, for example, a defendant is precluded from raising for the first on appeal a claim of double jeopardy, *United States* v. *Conley*, 503 F.2d 520, 521 (8th Cir. 1974); *Barker* v. *Ohio*, 328 F.2d 582 (6th Cir. 1964); *cf. United States* v. *Visconti*, 261 F.2d 215 (2d Cir. 1958), *cert. denied*, 359 U.S. 954 (1959); *United States* v. *Scott*, 464 F.2d 832 (D.C. Cir. 1972); a claim of collateral estoppel, *United States* v. *Friedland*, 391 F.2d 378, 381-82 (2d Cir. 1968); *cf. United States ex rel. DiGiangiemo* v. *Regen*, Docket No. 75-2094 (2d Cir., Dec. 29, 1975), slip. op. 1281, at 1292-96; or the denial of a speedy trial, *United States* v. *Smalls*, 363 F.2d 417, 419 (2d Cir. 1966), *cert. denied*, 385 U.S. 1027 (1967); *Chapman* v. *United States*, 376 F.2d 705, 707 (2d Cir. 1967); *United States* v. *Beigel*, 370 F.2d 751, 756-57 (2d Cir. 1967).

This rule of waiver—plainly applicable to Gogarty's claims—prohibits the belated resurrection of unraised defenses, unless cause is shown to grant relief from the waiver. A showing of cause to grant relief is not made in circumstances where, as here, the facts establishing the alleged defect were, or could have been, discovered by the defendant or his counsel prior to trial. *Davis* v. *United States*, *supra*, 411 U.S. at 243; *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 362-64 (1963).* This

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See *United States* v. *Johnson*, 345 F.2d 457, 459 (6th Cir.), *cert. denied*, 382 U.S. 836 (1965); *United States* v. *Miller*, 246 F.2d 486 (2d Cir.), *cert. denied*, 355 U.S. 905 (1957); *Sewell* v. *United States*, 406 F.2d 1289 (8th Cir. 1969). Thus, pursuant to Rule 12(b)(2), his claim must be raised at or before trial, or else be waived.

* In *Davis* v. *United States*, *supra*, the Supreme Court affirmed the trial court's finding that there had been no cause shown to justify granting relief from a waiver under Rule 12(b)(2):

[Footnote continued on following page]

strict rule of waiver is especially applicable when, as in the instant case, the facts underlying the alleged defect in the prosecution were fully known to the defendant himself. See *United States* v. *Garnes*, 156 F. Supp. 467, 470-71 (S.D.N.Y. 1957), *aff'd*, 258 F.2d 530 (2d Cir. 1958), *cert. denied*, 359 U.S. 937 (1959); *Partida* v. *Castineda*, 384 F. Supp. 79, 84 (SD. Tex. 1974).

To all of this Gogarty lamely replies that Mr. Broderick, his trial counsel, did not know that the November 1973 assault complaint had been incorporated into the December 1973 deferred prosecution agreement or that

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" 'Petitioner offers no plausible explanation of his failure to timely make his objection to the composition of the grand jury. The method of selecting grand jurors then in use was the same system employed by this Court for years. No reason has been suggested why petitioner or his attorney could not have ascertained all of the facts necessary to present the objection to the court prior to trial.' " 411 U.S. at 243.

In *Shotwell Mfg. Co.* v. *United States, supra,* the Supreme Court again refused to relieve petitioners from the consequences of their waiver. The Court specifically rejected petitioners' claim that cause existed to excuse the waiver:

"'Petitioners have not advanced any reasons for overturning this settled course of decision. Rather, they argue that when public officials violate constitutional rights by actions whose illegality is not readily noticeable by the litigants or their counsel, sufficient cause has been shown to warrant relief from application of the Rule. . . .

In the circumstances of this case, petitioners' contentions are without foundation. In denying the motions the District Court found that the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial.

* * * * *

We need express no opinion on the propriety of the practices attacked. It is enough to say that we find no error in the two lower courts' holding that the objection has been lost." 371 U.S. at 362-64.

this complaint had been dismissed on July 3, 1975. (Br. at 7-8, 15-16). This claim, even if factually supported, does not legally excuse Gogarty's failure to raise this objection below, since, first, all of the previously recited facts were matters of public record which Gogarty's counsel, Mr. Broderick, either discovered, or could have discovered, simply by reviewing the documents on file in the Courthouse and, second, Gogarty himself must have been aware of the deferred prosecution agreements, since he had signed them after consultations with counsel.

Accordingly, Gogarty cannot claim that the facts establishing his objection were not, or could not have been, discovered by himself or his counsel prior to trial. See *Davis* v. *United States*, *supra*; *Shotwell Mfg. Co.* v. *United States*, *supra*. Furthermore, in light of his own personal knowledge as to the details of the deferred prosecution agreements, Gogarty may not rely upon his attorney's purported ignorance of those details as justification for belatedly asserting this objection. See *United States* v. *Garnes*, *supra*.

But not only is Gogarty's belated assertion that his trial counsel was ignorant of the terms of the deferred prosecution agreements legally insufficient to rebut the Government's claim of waiver, it also finds no factual support in the record below. The single reference to the record cited in Gogarty's brief to establish Mr. Broderick's purported ignorance—Tr. at 72—fails to lend support to his position. On page 72 of the trial transcript, Mr. Broderick did nothing more than decline to question Agent Kehoe on the details of the treatment Gogarty was to receive under the deferred prosecution programs. This excerpt establishes, if anything, only that Mr. Broderick was fully aware at the time of trial that his client had entered a deferred prosecution program in 1973.

Indeed, prior to the questioning of Agent Kehoe, Mr. Broderick demonstrated a thorough knowledge of his client's required participation in the psychiatric treatment program that had been set up under the first deferral agreement. (Tr. at 68-69). This surely indicates that defense counsel had far more familiarity with Gogarty's past history than Gogarty would now have this Court believe. It is, moreover, virtually inconceivable that an experienced trial attorney, upon being assigned to represent a client on a charge dating back over two years, would not have consulted the records of the court to ascertain what had transpired in the case and, as well, conferred with his client and his client's former attorneys in order to learn the history and facts of the case.*

Gogarty does not wish to let his claim to reversal rest only on his unpersuasive claim of non-waiver; he also chooses to address the merits of his claim by baldly asserting that "[i]t is also undisputed that appellant underwent the psychiatric treatment mandated by the agreement" (Br. at 10) and that the dismissal of his complaint in July 1975 was in recognition of "appellant's compliance with the [deferred prosecution] agreement." (Br. at 12-13; see also Br. at 10, 11). Claims such as these, made for the first time on appeal, are an object lesson as to why defenses and objections aired for the first time on appeal should be rejected.

For had Gogarty given the Government the opportunity to reply to these charges below, see *Chapman* v. *United States*, *supra*, 376 F.2d at 707, the Government would have been prepared to establish the following facts

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* Conspicuously absent from the appellate record is an affidavit from Mr. Broderick lending support to Gogarty's claims. Such an affidavit is surely to be expected when the unsupported assertions made on appeal approach a claim of ineffective assistance of counsel. See *United States* v. *Wisniewski*, 478 F.2d 274, 284-85 (2d Cir. 1973), and the cases cited therein.

concerning Gogarty's *noncompliance* with the deferred prosecution agreements:

1. Gogarty was arrested in November 1973 and charged with the March 1973 assault because he had utterly failed to comply with his obligations under the first deferred prosecution agreement by, *inter alia*, refusing to attend an approved out-patient psychiatric clinic;

2. Within two weeks of his execution of the second deferred prosecution agreement in December 1973, Gogarty had checked himself out of an approved in-patient treatment program, again in violation of his obligation under the deferred prosecution agreement;

3. On January 8, 1974, Gogarty and the Government agreed to modify the terms of the deferral program to require Gogarty to make bi-weekly visits and weekly telephone calls to the United States Attorney's Office. Gogarty complied with this condition for only two weeks, after which time he failed to make any of the appearances or calls as required;

4. On January 28, 1974, at a conference attended by Gogarty and his attorney, the Government refused to consent to a modification of Gogarty's bail limits that would have allowed him to travel to California;

5. On February 10, 1974, Gogarty was arrested in the Northern District of Texas after he conveyed a bomb threat to a stewardess aboard a commercial airlines flight between Dallas, Texas and San Diego, California;

6. On or about July 3, 1974, Gogarty entered into a deferred prosecution agreement in Texas;

7. On July 14, 1974, Gogarty eloped from the Texas deferral program by signing himself out of an in-patient treatment program at Wichita

Falls, Texas. A warrant for Gogarty's arrest was issued on July 20, 1974;

8. Gogarty was apprehended in New York on July 30, 1974. He was held in the custody of the United States Marshall until September 1974, at which time he was removed to Texas;

9. On December 6, 1975, Gogarty pled guilty to violations of Title 18, United States Code, Sections 35(b) and 32 (destruction of aircraft facilities and conveying a bomb threat) before the Honorable Eldon B. Mahon, of the United States District Court for the Northern District of Texas. On that same date, Judge Mahon sentenced Gogarty to 140 days and credited to that sentenced the 130 days that he had alreay spent in confinement;

10. For readily apparent reasons, the Government never received reports from any psychiatric clinic or alcoholic treatment center indicating that Gogarty had satisfactorily undergone treatment.

In summary, had Gogarty raised a timely objection to the reinstitution of the assault charge prior to his conviction below, the Goverment would have been prepared to establish *on the record* that it was Gogarty who abrogated the deferred prosecution agreements by flagrantly and persistently refusing to comply with any of his obligations under the agreements.*

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* The Government recognizes that when a defendant acts in good faith upon an agreement of the Government not to prosecute him, the Government may not thereafter renege upon its agreement by initiating prosecution. *United States* v. *Garcia*, 519 F.2d 1343 (9th Cir. 1975); *cf. Santobello* v. *New York*, 404 U.S. 257 (1971); *United States* v. *Carter*, 454 F.2d 426 (4th Cir. 1972). However, where, as the Government was prepared to establish below, the defendant himself has abrogated the terms of his agreement, the Government is not bound to refrain from prosecution. *United States* v. *Ciotti*, 469 F.2d 1204, 1207 (3d Cir.

[Footnote continued on following page]

Thus, the Government would have been able to establish that its dismissal of the assault complaint on July 3, 1974 was in no way tied to its obligations under the previously abrogated deferred prosecution agreements to dismiss the charges with prejudice to future prosecution.*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JAMES A. MOSS,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys, Of Counsel.

1972), *vacated on other grounds*, 414 U.S. 1151 (1974); *United States* v. *Boulier*, 359 F. Supp. 165, 170 (E.D.N.Y. 1972), *aff'd sub nom. United States* v. *Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); *United States* v. *Goodrich*, 493 F.2d 390, 393 (9th Cir. 1974).

* Absent an obligation or express intention to refrain from further prosecution, the dismissal of the complaint on July 3, 1975, upon request of the Government, did not bar the reinstitution of prosecution on the assault charge. See Rule 48(a), Federal Rules of Criminal Procedure; *United States* v. *Ortega-Alvarez*, 506 F.2d 455 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *DeMarrias* v. *United States*, 487 F.2d 19, 21 (8th Cir. 1973), *cert. denied*, 415 U.S. 980 (1974); *United States* v. *Davis*, 487 F.2d 112, 118 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974); *United States* v. *Senak*, 477 F.2d 304, 306 (7th Cir.), *cert. denied*, 414 U.S. 856 (1973); *United States* v. *Kress*, 451 F.2d 576, 577 (9th Cir. 1971), *cert. denied*, 406 U.S. 923 (1972); *United States* v. *Chase*, 372 F.2d 453, 463-64 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967).

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK

JAMES A. MOSS, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27th day of February, 1976 he served ~~a copy~~ two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Courthouse
Foley Square
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

James A. Moss

JAMES A. MOSS

Sworn to before me this

27th day of February, 1976.

Maria A. Morales

MARIA A. MORALES
NOTARY PUBLIC, State of New York
No. 31 - 4521851
Qualified in New York County
Term Expires March 30, 1976